stipulated to the trial of the consolidated actions on January 31, 2005. During these proceedings, Azoff gained access to the discovery that had taken place during the Eagles action. As to Azoff, almost all of the factors enumerated by the Supreme Court in *St. Agnes, supra,* 31 Cal.4th at 1196 militate in favor of waiver. Azoff's actions were inconsistent with the right to arbitrate; there had been substantial litigation activity before Azoff sought arbitration; the request for arbitration was close to a trial date; and Azoff took steps not available in arbitration. Felder was 'affected, misled or prejudiced' (*St. Agnes, supra,* 31 Cal.4th at 992) by the delay and actions of Azoff. There is not sufficient evidence supporting the trial court's finding that Azoff did not waive arbitration.

"The facts concerning the Eagles presents an even stronger case for waiver. Prior to their belated effort to invoke their right to arbitrate any claims of Felder under the Memorandum, the Eagles defendants filed a cross-complaint against Felder and vigorously litigated the now-consolidated cases for over three years. This intense litigation generated numerous court filings and thousands of pages of discovery. The Eagles defendants even brought a discovery motion in July 2004. Without a doubt, 'the litigation machinery has been substantially invoked.' (*Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 992.) Moreover, a mere four days prior to joining in Azoff's motion, the Eagles defendants stipulated that the case would be tried on January 31, 2005, that this was a firm date, and that no party would request a trial continuance. Felder's prejudice is demonstrated by the expenditure of hundreds of thousands of dollars in attorney's fees and participation in a costly discovery process that allowed the defendants to gain information about Felder's case that

they could not have gained through arbitration. (*See Guess?, Inc. v. Superior Court, supra,* 79 Cal.App.4th at p. 558; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212-215; *Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 995.) There is virtually no evidence that the Eagles defendants did not waive arbitration." (Appendix at 8a-10a.)

II. Granting The Petition Would Result Only In Unconscionable Delay.

If this Court were to issue the requested writ, take the case, and rule that the question of waiver by litigation conduct must be determined by the arbitrator, and not the courts, the only result would be delay and inefficiency. Ultimately, an arbitrator, after reviewing the same undisputed facts, would have to find that petitioners had waived arbitration by their litigation conduct and would again remand the case to the Los Angeles Superior Court for trial. Years would have passed and the case would be no closer to resolution on the merits.

The First Circuit Court of Appeals reached the same conclusion in *Marie v. Allied Home Mortgage Corp.,* 402 F.3d 1 (1st Cir. 2005):

> "Finally, sending waiver claims to the arbitrator would be exceptionally inefficient. A waiver defense is raised by one party to a lawsuit in response to another party's motion to compel arbitration or stay judicial proceedings on the basis of an arbitration agreement signed by the parties. If the arbitrator were to find that the defendant had waived its right to arbitrate, then the case would inevitably end up back before the district court with the plaintiff again pressing his

claims. The case would have bounced back and forth between tribunals without making any progress. [Citations]

"This is different in kind from the arbitrator's normal resolution of a gateway issue: normally, the resolution of such an issue would bar not only arbitration but any sort of litigation on the issues by either side. Thus, allowing courts to decide waiver issues – at least when due to litigation-related activity – furthers a key purpose of the FAA: to permit speedy resolution of disputes." (*Id.* at 13-14.)

III. The Clear Weight Of Authority Is That Waiver By Litigation Conduct Is Properly Decided By The Courts.

Petitioners claim that they are presenting to this Court an important issue of federal law on which this Court has ruled and the Circuit Courts are divided. The claim is without substance.

As this Court knows better than counsel, *Howsam, supra,* 539 U.S. 79, did not involve a claim of waiver by litigation conduct at all. Rather, it concerned the application of the six-year limitations period contained within the arbitration rules under which the parties had agreed to arbitrate. This Court held that the application of that contractual limitation was for the arbitrator, and not the courts. In its well-reasoned opinion, in *Marie v. Allied Home Mortgage Corp., supra,* 402 F.3d 1, the First Circuit Court of Appeals held that *Howsam* did not require that the issue of waiver by litigation conduct be decided by the arbitrator. To the contrary, that issue was not presumptively within the expertise of the arbitrator because it did

not arise out of the language of the arbitration agreement or the arbitration rules. As the Court in *Marie* found:

> "[T]he comparative expertise considerations expressed in *Howsam* and *Green Tree* [*Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003)] argue for judges to decide this issue. [Citations] Judges are well-trained to recognize abusive forum shopping. [Citations] As well, the inquiry heavily implicates 'judicial procedures,' which *Green Tree* suggests should be an important factor in presuming that an issue is for the court. [Citation] Further, the procedural waiver issue is not likely to be intertwined with the merits of the dispute." (402 F.3d at 13)

Therefore, the First Circuit correctly held as follows:

> "We hold that the Supreme Court in *Howsam* and *Green Tree* did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court." (*Id.* at 14)

The California Court of Appeal applied the same traditional rule in the instant case. It used its expertise to reject the abusive forum shopping by the Eagles Defendants and Azoff which was evident in their effort to send to arbitration the consolidated action after it had been litigated for more than three years.

Petitioners cite to no well-reasoned authority[2] holding that a court must send to an arbitrator the question

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[2] The case cited by petitioners to show a conflict in the Circuits is *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.,* 328 F.3d 462, 466 (8th Cir. 2003). However, that decision relies on a single sentence of *Howsam* taken out of context and is devoid of analysis.

(Continued on following page)

whether litigation conduct in that very court waived the right to arbitrate. That question is peculiarly within the expertise of the court, and not the normal "gateway" issue reserved to the arbitrator in *Howsam* and *Green Tree*. *See Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed.Appx. 462, 464 (5th Cir. 2004).

IV. The Decision Below Does Not Conflict With The Policy Underlying The Federal Arbitration Act.

As discussed above, no policy of the Federal Arbitration Act ("FAA") and no authority mandates that parties, after aggressively litigating a case for years in the courts, should be able to shift the forum to arbitration because it suits their new strategy. To the contrary, as discussed in *Howsam* and *Marie*, the policy underlying the FAA favors decision by the court of issues of waiver by litigation conduct occurring in that court. 539 U.S. at 85; 402 F.3d at 13-14.

Furthermore, in the instant case, the policy underlying the FAA is not at issue because the parties did not agree unequivocally that their disputes should be arbitrated. The arbitration clause on which petitioners rely, when read in its entirety, is unintelligible; and the Preliminary 2000 Deal Memorandum, which contains the purported arbitration clause, is only tangentially related to the claims against the Eagles Defendants and unrelated to the claims against Azoff.

Marie applies the rationale of *Howsam* based upon the purposes of the Federal Arbitration Act and the traditional roles of courts and arbitrators.

The Preliminary 2000 Deal Memorandum is set forth at Appendix D, pages 15a-31a. The purported arbitration clause is quoted hereinabove at footnote 1. It is not clear from reading that language whether arbitration was even intended by the parties, or whether the reference to arbitration was a typographical error. It appears that the reference to arbitration was erroneously inserted into a provision intended only to deal with the application of California law and issues of jurisdiction and venue. That conclusion is bolstered by the fact that the provision states that the right to arbitration is "further specified in the 1994 Deal Memorandum," yet the referenced 1994 Deal Memorandum contains no arbitration provision whatsoever and makes no reference to arbitration. There is no policy in favor of arbitration unless the parties have agreed to submit their disputes to an arbitrator. *Badie v. Bank of America*, 67 Cal.App.4th 779, 787-788, 804 (1998).

Assuming, *arguendo*, that there was an enforceable agreement to arbitrate, the obligation to arbitrate would be limited to "disputes arising out of or in connection with this agreement . . . . " None of the claims against Azoff in the Azoff Action fits that description, and only marginal claims in the Eagles Actions would be arbitrable.

The allegations against Azoff in the Azoff Action make no reference whatsoever to the Preliminary 2000 Deal Memorandum and do not assert a dispute arising out of or in connection with that agreement. The Azoff Action alleges that, between 1994 and 2001, Azoff conspired with Henley and Frey to diminish Felder's compensation, to reduce Felder's ownership and control of the band, to divert corporate opportunities, and to oust Felder from the band. The facts on which those allegations are based do not include reference to the Preliminary 2000 Deal Memorandum or allegations that that agreement was breached.

The Preliminary 2000 Deal Memorandum, attached to the petition as Appendix D, related solely to the distribution of a four-CD "box set" of Eagles recordings, consisting of three CDs of previously recorded material and one CD of "Millennium Concerts" recorded at the end of 1999. The Preliminary 2000 Deal Memorandum provided expressly that it had nothing to do with the ownership of the Eagles name or the rights of Felder or any other member of the band in that name. (Paragraph 4(c), at Appendix 22a.) That Memorandum had nothing to do with the matters at issue in the Azoff Action, which alleged that Azoff conspired with Henley and Frey to remove Felder from the band and to deprive him of his ownership interest in Eagles, Ltd. There was no allegation that Azoff failed to perform any obligations he had under that Memorandum. Indeed, Azoff was not a party to the Memorandum and had no obligations to perform under it.

It is also clear that the allegations against the Eagles Defendants did not focus on the Preliminary 2000 Deal Memorandum. The gravamen of the action against the Eagles Defendants was that Felder was wrongfully ousted from the band without cause and deprived of the value of his ownership interest in the Eagles name. Those claims had nothing to do with the Preliminary 2000 Deal Memorandum and were not arbitrable under it.[3]

———◊———

[3] Only the fifth and sixth causes of action of the Second Amended Complaint against the Eagles Defendants related to the Preliminary 2000 Deal Memorandum. The fifth cause of action alleged a breach of the Memorandum by refusing to allow Felder to examine the books of N.E.A., LLC. The sixth cause of action sought an accounting of various entities, including N.E.A., LLC.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: August 15, 2005

Respectfully submitted,

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RESPONDENT'S APPENDIX

No. _____

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION, _____

DON FELDER,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY – CENTRAL DISTRICT,

Respondent,

EAGLES, LTD.; DON HENLEY; GLENN FREY; EAGLES TOURING CO.; EAGLES MERCHANDISING CO.; EAGLES RECORDING CO.; N.E.A. LLC; and IRVING AZOFF,

Real Parties in Interest.

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [EXHIBITS (17 VOLUMES) FILED UNDER SEPARATE COVER]

From the Superior Court for Los Angeles County – Central District Case No. BC 244814 [Consolidated with BC249741 and BC309927] Honorable Mel Red Recana, Judge; Dept. 45 After Order Granting Motion to Compel Arbitration and Ordering Consolidated Cases to Binding Arbitration.

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PETITION FOR WRIT OF MANDATE

INTRODUCTION

By its order dated September 20, 2004; respondent Superior Court ordered to arbitration three consolidated cases brought by petitioner Don Felder ("petitioner," "plaintiff" or "Felder") arising out of his wrongful ouster from the legendary rock and roll band The Eagles. That order was an abuse of discretion and erroneous as a matter of law because defendants in all three cases unequivocally waived arbitration by their litigation conduct and because the purported arbitration provision is unintelligible and does not cover the claims alleged in the consolidated action.

Issuance of a writ of mandate is essential because it is the only remedy that will preserve petitioner's right to a trial of the consolidated action and redress a gross miscarriage of justice. If the writ is denied, petitioner will be wrongfully deprived of his constitutional right to a jury trial and severely prejudiced in having to arbitrate the consolidated cases after three and one-half years of litigation.

THE PARTIES

1. All exhibits accompanying this petition under separate cover are true and correct copies of documents on file with respondent court, except Exhibits 11 and 12, which are true and correct copies of the original reporter's transcripts of the hearings of August 9, 2004 and September 15, 2004, respectively. The exhibits are numbered 1 through 13. Because the original documents filed with respondent court contained numerous tabbed exhibits, the documents are identified herein as "Exhibit No. ___ at exhibit ___, page ___." All of the exhibits have been consecutively paginated.

2. Petitioner Don Felder ("Felder" or "plaintiff" or "petitioner") is the plaintiff in all three of the consolidated cases – Case No. BC244814 and BC249741 (the "Eagles Actions") and Case No. BC309927 (the "Azoff Action"). Felder was the lead guitarist of the Eagles band for 27 years until he was wrongfully ousted from the band in February 2001. At all times material, Felder was a one-third owner of Eagles, Ltd., the company that owns the Eagles name and trademark. Felder composed the music for the Eagles' most famous song, "Hotel California," as well as other songs.

3. Case No. BC244814 was filed on February 8, 2001 against defendants and real parties in interest Eagles, Ltd., Don Henley ("Henley") and Glenn Frey ("Frey") for involuntary dissolution and an accounting. Henley and Frey are each one-third owners of Eagles, Ltd. and are the principal singers and composers of the band. Case No. BC249741 was filed on May 2, 2001 against the same defendants and real parties in interest, as well as defendants and real parties in interest Eagles Touring Co.,

Eagles Merchandising Co., Eagles Recording Co., and N.E.A., LLC[1] for breach of implied-in-fact contract, wrongful termination, breach of fiduciary duty, breach of written contract, accounting, and declaratory relief. Those two cases were related and are referred to hereinafter as the "Eagles Actions" against the "Eagles Defendants."

THE EAGLES ACTIONS ARE CONSOLIDATED AND LITIGATED

4. After the Eagles Actions were consolidated, respondent court ordered that the allegations in those actions be combined into a single pleading, which was filed as the Second Amended Complaint on October 22, 2001 (Exhibit No. 5 at exhibit T, page 904.)

5. Each of the Eagles Defendants filed an identical answer to the Second Amended Complaint, alleging 15 affirmative defenses. None of the affirmative defenses made any reference to a claimed right to arbitrate the dispute. (Exhibit No. 5 at declaration paragraph 31, at pages 557-558 and exhibit U, at page 939.)

6. The Eagles Actions were aggressively litigated by the parties from February 2001 through July 2004. With his opposition to the motion to compel arbitration, plaintiff filed an Appendix of Discovery to show respondent court the staggering volume of discovery in the Eagles Actions. The Appendix of Discovery is Exhibit 6 hereto and covers pages 1083 to 4219 under tabs numbered 1 to 195. Plaintiff also filed with respondent court the pleading index

[1] These entities were created by Henley and Frey to receive revenues generated by the Eagles that had previously been received by Eagles, Ltd.

from the Christensen Miller firm showing 400 separate entries, filling 29 volumes of pleadings from January 2001 through July 2004 (Exhibit No. 5 at exhibit A, pages 560-649.)

7. As reflected in the Appendix of Discovery and the pleading index, there were 12 depositions taken by plaintiff and defendants in the Eagles Actions, comprising more than 4,300 pages, and including five full days of plaintiffs deposition by the Eagles Defendants. Plaintiff Felder was questioned about every aspect of his relationship with the Eagles and Azoff going back to 1974, when Felder first joined the Eagles. Plaintiff was required to explain all of the facts underlying the allegations in the Second Amended Complaint and his reasons for believing that he had been wrongfully ousted from the band.

8. Also, as reflected in the Appendix of Discovery and the pleading index, the Eagles Defendants propounded two massive sets of document requests, one set of requests for admissions, three sets of form interrogatories, and one set of special interrogatories exploring in detail all of the legal theories, facts, documents, and witnesses upon which Felder relied. In response, Felder produced thousands of pages of documents, as well as volumes of answers and objections to the discovery demands.

9. The Appendix of Discovery and the pleading index filed with respondent court also show that plaintiff conducted extensive written discovery of the Eagles Defendants, including multiple sets of requests for admissions, special interrogatories, form interrogatories, and requests for production of documents.

10. As late as July 1, 2004, the Eagles Defendants moved to compel further responses to their second set of

requests for admissions, third set of form interrogatories, and first set of special interrogatories. (Exhibit No. 5 at exhibit Y, page 1030.)

11. The Eagles Defendants also cross-complained against Plaintiff in August 2002. In their cross-complaint, the Eagles Defendants alleged that Felder intended to write a book about the Eagles and that that would violate a confidentiality provision in the 1994 Deal Memorandum among the band members. (Exhibit No. 5 at exhibit W, page 1012.) In February 2004, Felder asked the Eagles Defendants to dismiss their cross-complaint based on Felder's written agreement that he would not publish a book about the Eagles, but the Eagles Defendants refused to dismiss their cross-complaint. (Exhibit No. 5 at exhibit X, page 1027.)

12. Felder paid hundreds of thousands of dollars in attorney's fees and costs in litigating the Eagles Actions in respondent court.

13. On June 14, 2004, Felder voluntarily dismissed without prejudice the prayer for dissolution of Eagles, Ltd. in the Second Amended Complaint, leaving to be tried in the Eagles Actions the causes of action for breach of implied-in-fact employment contract, wrongful termination, breach of fiduciary duty, breach of written contract, accounting, and declaratory relief.

THE AZOFF ACTION IS CONSOLIDATED AND LITIGATED

14. On January 30, 2004, plaintiff filed his action against Irving Azoff, the manager of the Eagles for breach of fiduciary duties and constructive fraud, (the "Azoff

Action"). Plaintiff Felder alleged that Azoff owed fiduciary duties to him as the manager of the Eagles and as his manager and that Azoff breached those duties by conspiring with Henley and Frey to orchestrate Felder's ouster from the band and by favoring the interests of Henley, Frey and Azoff over the interests of Felder. (Exhibit No. 5 at exhibit V, Page 957.) The Azoff Action did not name Henley and Frey as defendants or seek relief against them.

15. In February 2004, O'Melveny & Myers – the same attorneys who represented the Eagles Defendants since February, 2001 – appeared on behalf of Azoff. They litigated the Azoff Action in respondent court from February 2004 through July 2004.

16. Commencing in February 2004, counsel for Azoff engaged in a lengthy series of negotiations with counsel for plaintiff regarding consolidation of the Azoff Action with the Eagles Actions and the date for trial. (Exhibit No. 5 at exhibit F, page 674.)

17. Ultimately, counsel for Azoff stipulated that the Azoff Action, filed January 30, 2004, should be consolidated for all further proceedings with the Eagles Actions, which had been pending since February 2001, and respondent court so ordered on March 10, 2004. (Exhibit No. 5 at exhibit G, page 701.) Neither the Eagles Defendants nor Azoff made any mention of any claimed right to arbitration when the Eagles Actions and the Azoff Action were consolidated.

18. Also, in March 2004, Azoff filed a motion to strike allegations from the Azoff Action and for sanctions. Only after plaintiff agreed to amend certain allegations incorporated by reference in the Azoff Action, Azoff sought

and obtained an order from respondent court withdrawing his motion to strike and for sanctions. (Exhibit No. 5 at exhibits H and I, pages 709 and 714.)

19. On April 14, 2004, Azoff demurred to the complaint against him in the Azoff Action. The demurrer challenged the complaint on the merits, arguing that Azoff was not Felder's manager, that Azoff owed no fiduciary duties to Felder, and that Azoff did not intend to deceive Felder. Azoff made no mention of any claimed right to arbitration. (Exhibit No. 5 at exhibit J, page 717.)

20. At a hearing on May 3, 2004 in respondent court – three months after the Azoff Action was filed – Azoff sought a continuance of the trial in the consolidated action from August 16, 2004 to Spring 2005. The basis for the request was that Azoff needed more time to conduct discovery. There was no suggestion that the consolidated action or that the Azoff Action alone should be arbitrated. To the contrary, Azoff and the Eagles Defendants agreed expressly that the case should be tried in respondent court and agreed that the trial date would be January 31, 2005. (Exhibit No. 5 at exhibit O, pages 784-788 and 790-791.)

21. Although Azoff did not propound his own written discovery in the Azoff Action in addition to the massive written discovery propounded by the Eagles Defendants in the Eagles Actions, Azoff did schedule depositions of Felder and his transactional lawyer and responded to Felder's written discovery. (Exhibit No. 5 at exhibit N, page 772.) In those responses, Azoff asserted numerous objections which never raised a claim to arbitration. (Exhibit No. 5 at exhibit Q, page 802.)

22. On June 14, 2004 – four and one-half months after the Azoff Action was filed – Azoff answered the

complaint. He asserted 15 affirmative defenses but never even mentioned a claimed right to arbitration. (Exhibit No. 5 at exhibit L, Page 740.)

23. In July 2004, new counsel for Azoff substituted into the case in place of O'Melveny & Myers, which continued to represent the Eagles Defendants. Azoff's new counsel, Kaye Scholer, asked for a continuance of Azoff's deposition, then scheduled for July 13, 2004, to provide more time to prepare for the deposition. All parties in the consolidated action then entered into a written stipulation, which continued Azoff's deposition to August 11, 2004 and confirmed the depositions of Felder and Barry Tyerman (his transactional lawyer), Henley, and Frey in late September 2004. The stipulation also confirmed in writing the agreement of all parties in the consolidated action that the January 31, 2005 trial date in respondent court was "firm" and would not be continued. Respondent court entered its order on the stipulation on August 5, 2004. (Exhibit No. 5 at exhibit P, page 794.)

24. Azoff's new counsel conceded at a hearing on August 9, 2004 that his file consisted of 27 boxes and included the discovery taken in the Eagles Actions. (Exhibit No. 11, at pages 4591-4592 and 4595.)

THE MOTIONS TO COMPEL ARBITRATION

25. On August 9, 2004, Azoff, through his new counsel, filed a motion to compel arbitration of all claims in the consolidated action. (Exhibit 1 at page 1.) A right to arbitration was claimed under a purported arbitration clause in the Preliminary 2000 Deal Memorandum, as follows: "This agreement shall be governed by the laws of the State of California without regard to its choice-of-law

principles, and in Los Angeles, California shall have exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum." (Exhibit No. 5 at exhibit D, page 658.)

26. Although the purported arbitration agreement stated that the right to arbitrate was "further specified in the 1994 Deal Memorandum," the 1994 Deal Memorandum made no reference whatsoever to arbitration. (Exhibit No. 5 at exhibit E, pages 664 to 673.)

27. Azoff claimed that his petition to compel arbitration was timely, that he was a third party beneficiary of the Preliminary 2000 Deal Memorandum, and that, because the cases were consolidated, all claims had to be arbitrated.

28. On August 9, 2004, the Eagles Defendants joined in Azoff's motion to compel arbitration of all claims in the consolidated action. (Exhibit No. 3, page 410.) The Eagles Defendants argued that the claims against them had to be arbitrated because the cases were consolidated and Azoff had a right to arbitrate and that the filing of the Azoff Action gave the Eagles Defendants the right to "revisit" their decision to forego arbitration, despite three and one-half years of litigation.

RESPONDENT COURT'S DECISION

29. The motion to compel arbitration was heard on September 15, 2004 in respondent court. (Exhibit No. 12, at page 4606.) After oral argument, respondent court took the motion under submission.

30. On September 20, 2004, respondent court issued its ruling (Exhibit No. 13, page 4645). Respondent court ordered the consolidated cases to binding arbitration and stayed all proceedings pending the outcome of arbitration. Respondent court found that Azoff had not waived his right to arbitrate because his motion was timely, he had not conducted any discovery, and plaintiff had suffered no prejudice from Azoff's actions. Respondent court's ruling said nothing about the litigation of the Eagles Actions, any prejudice to plaintiff from the three and one-half years of litigation of the Eagles Actions by the same counsel who had represented Azoff, the stipulation to consolidate the Eagles Actions and the Azoff Action, or the stipulation and court order to try the consolidated action in respondent court on January 30, 2005.

BASES FOR RELIEF

31. Respondent court's order is an abuse of its discretion and erroneous as a matter of law because the Eagles Defendants and Azoff, by their litigation conduct and use of discovery, waived any right they might have had to arbitrate the consolidated action and are judicially estopped from moving to compel arbitration. The Eagles Defendants, with knowledge of the purported arbitration clause, litigated the case aggressively for three and one-half years and thereby deprived plaintiff of any benefit he could have derived from a timely arbitration. Azoff, with knowledge of that litigation and of the purported arbitration clause, and with access to the discovery in the Eagles Actions, litigated the Azoff Action for seven months, stipulated to the consolidation of the Azoff Action with the Eagles Actions, and stipulated that the consolidated action would be tried in respondent court on January 31, 2005.

32. There can be no doubt that the Eagles Defendants waived arbitration by their three and one-half years of aggressive litigation. Assuming, *arguendo,* that respondent court could find that Azoff had not waived arbitration by his litigation conduct over seven months, it could not order the claims against the Eagles Defendants to arbitration. At most, the claims against Azoff could have been ordered to arbitration, while the Eagles Actions were ordered to trial. Respondent court abused its discretion in ordering the three consolidated cases to arbitration.

33. The purported arbitration clause is unintelligible and refers to an arbitration clause in the 1994 Deal Memorandum which does not exist.

34. The purported arbitration clause has no application to the Azoff Action. The Azoff Action does not allege against Azoff any claim arising out of or in connection with the Preliminary 2000 Deal Memorandum. That memorandum dealt with the release of a four-CD Box Set and a Millennium Album, which events are not in dispute with Azoff. Azoff was not a signatory to the Preliminary 2000 Deal Memorandum or an intended beneficiary. The Eagles Actions do not assert causes of action against Azoff. The fifth and sixth causes of action in the Second Amended Complaint (Exhibit No. 5 at exhibit T, page 904), which allege that Henley and Frey breached the Preliminary 2000 Deal Memorandum by refusing to allow Felder to examine the books and records of N.E.A., LLC, assert no claims against Azoff and are unrelated to any claims in the Azoff Action.

35. Petitioner was profoundly prejudiced by the failure of the Eagles Defendants and Azoff to timely demand arbitration. During the litigation of the Eagles

Actions, petitioner expended hundreds of thousands of dollars in attorney's fees and costs and divulged all of the facts, witnesses, documents, and legal theories supporting each of his claims. All of that discovery redounded to the benefit of Azoff, who was represented by the same counsel. The prejudice to petitioner was compounded by Azoff because petitioner would never have sought consolidation or agreed to consolidation of the Eagles Actions with the Azoff Action if he had known that Azoff would assert a right to arbitration. From January 30, 2004 through the end of July 2004, Azoff was represented by the same counsel as the Eagles Defendants and never claimed any right to arbitration. Indeed, Azoff answered the complaint on June 14, 2004 and asserted 15 affirmative defenses, none of which even mentioned a claimed right to arbitration.

36. Petitioner has no right of appeal from respondent court's order and has no plain, speedy and adequate remedy at law other than the relief sought in this petition.

37. If the petition for writ of mandate is denied, petitioner will suffer irreparable injury because he will be forced to arbitrate his disputes against the Eagles Defendants and Azoff after having litigated the consolidated action for three and one-half years and will be deprived of his constitutional right to a jury trial.

38. Petitioner's right of appeal, which can be invoked only after the consolidated action is concluded, is wholly inadequate because that right will not redress petitioner's loss of his right to try the consolidated action in the Superior Court.

PRAYER

WHEREFORE, petitioner prays that:

1. An alternative writ of mandate issue under the seal of this Court commanding respondent court (1) to vacate its order of September 20, 2004 compelling the arbitration of the consolidated cases and (2) to enter a new order denying the motion to compel arbitration and setting the consolidated cases back on track for trial, or to show cause before this Court at a time and place then or thereafter specified by Court order why it has not done so and why a peremptory writ should not issue.

2. On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under the seal of this Court commanding respondent court (1) to vacate its order of September 20, 2004 compelling the arbitration of the consolidated cases and (2) to enter a new order denying the motion to compel arbitration and setting the consolidated cases back on track for trial.

3. This Court award petitioner his costs of this action.

4. The Court grant such other relief as may be just and proper.

Dated: October 8, 2004 Respectfully submitted,

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: /s/ Joel N. Klevens
JOEL N. KLEVENS,
Attorneys for Petitioner,
Don Felder

VERIFICATION

I, Don Felder, declare as follows:

1. I am the plaintiff in the consolidated actions, Case No. BC244814 and Case No. BC249741 (the "Eagles Actions") and Case No. BC309927 (the "Azoff Action"), and I am the petitioner herein.

2. I have read the petition for writ of mandate and know its contents. All facts alleged in the petition are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California on October 8th, 2004.

/s/ Don Felder
DON FELDER

Supreme Court, U.S.
FILED
SEP 8 - 2005
OFFICE OF THE CLERK

(3)

No. 04-1713

IN THE

Supreme Court of United States

EAGLES, LTD., DON HENLEY, GLENN FREY, EAGLES TOURING CO., EAGLES MERCHANDISING CO., EAGLES RECORDING CO., N.E.A., LLC, AND IRVING AZOFF,
Petitioners,

— v. —

DON FELDER,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

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REPLY BRIEF FOR PETITIONERS

1. Respondent does not – and could not – seriously dispute that a direct and acknowledged conflict exists among federal circuit and state high court decisions on the question presented by this case, *viz.*, whether a waiver defense to arbitration under an agreement governed by the Federal Arbitration Act ("FAA") is an issue for the court (rather than the arbitrator) merely because the alleged waiver is based on a party's litigation conduct. This Court broadly held in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), that "allegations of waiver, delay, or a like defense of arbitrability" are matters for the arbitrator, and the Eighth Circuit and two state high courts have squarely concluded that the "allegations of waiver" committed to the arbitrator include allegations of waiver by litigation conduct. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *Woodland Ltd. P'ship v. Wulff*, 868 A.2d 860, 865 (D.C. 2005); *Guam Housing & Urban Renewal Auth. v. Pac. Superior Enter. Corp.*, 2004 Guam 22, ¶ 40. By contrast, the decision below, along with decisions of the First and Fifth Circuits, squarely hold that the question of waiver by litigation conduct is for the court, not the arbitrator. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004) (unpublished). Decisions of the lower courts are likewise divided on this important issue. Pet. 9. The First Circuit's decision in *Marie* explicitly acknowledges the direct conflict among the courts over the application of *Howsam* to the doctrine of waiver of arbitration by litigation conduct. *Marie*, 402 F.3d at 12 (discussing cases).

2. Unable to dispute the principal ground on which certiorari is warranted – the existence of a square decisional conflict on the precise question presented – respondent retreats to purely merits-based arguments. Respondent con-

tends that review should be denied because the court below (1) correctly concluded that waiver by litigation conduct is a question for courts (not arbitrators) to resolve, and (2) correctly concluded that petitioners' litigation conduct did, in fact, waive their right to compel arbitration. Those arguments are wrong on their own terms, but the more important point here is that respondent's merits arguments are just that – *merits* arguments, not reasons this Court should deny review and leave the lower courts in turmoil over the straightforward and undeniably important arbitration-enforcement question this case presents.

Although respondent's merits arguments are entirely premature at this jurisdictional stage, they are also incorrect. As to the substance of the question presented – who decides waiver by litigation conduct, the court or the arbitrator? – respondent contends that the decision below is supported by the "clear weight of authority," citing all of a single decision, the First Circuit's opinion in *Marie*. Br. Opp. 12. In truth the weight of authority strongly favors petitioners' position that all allegations of waiver, including those based on litigation conduct, are within the arbitrator's presumptive sphere of authority. *See Transamerica Occidental*, 328 F.3d at 466; *Woodland Ltd. P'ship*, 868 A.2d at 865; *Guam Housing & Urban Renewal*, 2004 Guam 22, ¶ 40; *Bellevue Drug Co. v. Advance PCS*, 333 F. Supp 2d 318, 324-25 (E.D. Pa. 2004); *Housh v. Dinovo Invs., Inc.*, 2003 U.S. Dist. LEXIS 3707, at *32-33 (D. Kan. 2003); *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 113 P.3d 961, 969 (Or. Ct. App. 2005).[1]

[1] *See also Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 351 F.3d 43, 46 (2d Cir. 2003) (under FAA and *Howsam*, *all* procedural defenses to arbitrability, including waiver, estoppel, and delay, are presumptively for the arbitrator to decide); *Int'l River Ctr. v. Johns-Manville Sales Corp.*, 861 So. 2d 139, 144 (La. 2003) (applying *Howsam* to conclude that for arbitration agreements governed by state statute similar to the FAA, "waiver is reserved for the arbitrator to decide").

Further, the flawed analysis in *Marie* only illustrates the extent to which respondent's view – and the decision below – departs from this Court's decision in *Howsam* and the fundamental policies of the FAA. As respondent acknowledges, *Marie* relies on the "important policy consideration" that courts possess "expertise" superior to arbitrators in determining whether litigation conduct constitutes a waiver of a right to compel arbitration otherwise enforceable under the FAA. Br. Opp. 13. But neither *Howsam* nor any other arbitration-related decision of this Court has ever endorsed such a cramped view of arbitrators' expertise. To the exact contrary, the Court has time and again reaffirmed that arbitrators are fully equipped to resolve difficult procedural, factual, and legal questions of all kinds. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 n.5 (1991); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). "[W]e are well past the time when judicial suspicion of . . . the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

Indeed, this very case illustrates the flawed anti-arbitrator presumption underlying *Marie*'s (and respondent's) reasoning. The argument that courts are superior to arbitrators in evaluating waiver by litigation conduct relies heavily on the trial court's proximity to (and thus presumed closer familiarity with) the relevant litigation conduct. But in this case, the trial court held that petitioners' conduct did *not* waive their right to arbitration. Pet. App. 12a-13a. Yet with no closer proximity to the conduct at issue than an arbitrator would have, the appellate court considered itself fully capable of evaluating the record and reaching its own, differing conclusion as to whether petitioners' litigation conduct waived their right to arbitrate the dispute. The appellate court's object demonstration that waiver-by-litigation-conduct arguments

can be evaluated on the basis of the record disproves the premise that first-hand proximity to the litigation conduct is a prerequisite for evaluating a waiver defense to arbitration arising from such conduct. And neither the appellate court nor respondent persuasively explains why an arbitrator cannot likewise analyze a litigation record and reach his or her own informed judgment as to whether that record establishes a waiver of a party's contractual right to resolve a dispute through arbitration.[2]

The conflicting decisions as to petitioners' asserted waiver reached by the trial and appeals courts in this case also refute respondent's suggestion that petitioners so obviously waived their right to arbitration that it would now be a waste of time to ask an arbitrator to make that determination. Br. Opp. 8-12. On its face respondent's substantive waiver argument of course has nothing whatsoever to do with the question presented here, which is not whether respondent's waiver argument *is correct*, but *to whom the argument should be addressed* (the arbitrator or the court). Nor would the answer be foreordained here, as respondent asserts. Br. Opp. 11. To the contrary, the trial court – the tribunal supposedly best positioned to evaluate waiver-by-conduct arguments – flatly *rejected* respondent's waiver argument. As

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[2] Moreover, resolution of most claims of waiver by litigation conduct (such as the one advanced by respondent in this case) involves a comparison of the information obtained by a party seeking to compel arbitration through discovery in court to the type of information the party could have obtained through discovery and claim specification procedures in arbitration. *See, e.g., St. Agnes Med. Ctr. v. PacifiCare*, 82 P.3d 727, 738 (Cal. 2003) (under FAA, waiver can be found where party obtained information through discovery that it could not have obtained in arbitration). It is arbitrators, not courts, who have superior expertise in determining what type of information can be obtained through arbitration. *Cf. PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (arbitration must be compelled under FAA where antecedent question on which defense to arbitration rests is within the arbitrator's sphere of authority).

the trial court explained, respondent would suffer no "prejudice" – a prerequisite to a finding of waiver by litigation conduct – because petitioner Azoff had only been party to the consolidated actions for a matter of months and timely filed his motion to compel arbitration "as soon as his counsel were up to speed" on the case. Pet. App. 12a. Further, Azoff had "taken no action to undermine or impair [respondent's] ability to take advantage of the benefits and efficiencies of arbitration" and gained no information through discovery that he could not have gained in arbitration. *Id.*[3] Respondent obviously disagrees with the trial court's substantive conclusion that petitioners' right to compel arbitration had not been waived, but that is irrelevant here. What matters is that the disagreement over waiver should not have been aired before the trial court at all, but should have been submitted to the arbitrator.[4]

Respondent's final merits-related contention is that the FAA is altogether inapplicable here because the parties did

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[3] Even though the case against the Eagles petitioners had been pending for a greater period of time, respondent's recent decision to change the nature of his case (Pet. 3) refuted any claim of waiver against them. *See Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (arbitration may be allowed even after active litigation where plaintiff changes "scope or theory" of original claims); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 509-10 (7th Cir. 1999) (same).

[4] Respondent's contention (again relying on *Marie*) that the issue of waiver by litigation conduct should be committed to the court simply for the sake of "efficiency" (Br. Opp. 11) contradicts repeated decisions of this Court squarely holding that assertions of potential "inefficiency" do *not* justify disregarding basic rules governing enforcement of arbitration agreements under the FAA. *See First Options, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) ("[T]he basic objective in this arena is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." (citations omitted)); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.").

not unequivocally agree to submit their disputes to arbitration. Br. Opp. 14-17. But the trial court below rejected that argument in finding the dispute to be arbitrable, and the court of appeal likewise assumed that petitioners had an otherwise enforceable right under the FAA to arbitrate the entire dispute, but waived that right through their litigation conduct. In other words, *neither* court below held that the parties lacked an enforceable agreement to arbitrate respondent's substantive claims, as respondent now contends. That issue is not presented here. The decisions below present – cleanly and clearly – a single question for resolution by this Court: whether the arbitrator's presumptive authority to decide waiver-based defenses to arbitration includes alleged waivers based on litigation conduct.

The Court should grant review to resolve the clear and irreconcilable conflict in the courts over that question.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

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